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2020 01558 B3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

BETWEEN:

REGINA

- v -

HAMILTON & OTHERS

SUBMISSIONS ON BEHALF OF THE RESPONDENT IN RELATION TO THE APPLICATION BY NICK WALLIS FOR ACCESS TO PAPERS IN THE PROCEEDINGS

SUMMARY OF THE RESPONDENT'S SUBMISSIONS

1. There is a clear presumption in favour of open justice, and a clear public interest in facilitating fair and accurate reporting of court proceedings. The Respondent is committed to ensuring open and fair reporting of matters properly ventilated in open court.

2. The Clarke Advice has not been read aloud in open court (or treated as such). Therefore, it is for the Court to decide what access to it should be provided to Mr Wallis, if any, in accordance with Criminal Procedure Rule 5.8 and Criminal Practice Direction 5B and in light of the ongoing investigation into Mr Jenkins.

3. The Respondent has produced a disclosure note to assist the Court with this decision and to place the Clarke Advice in its proper context.

4. The Court may wish to consider allowing Mr Wallis and other interested journalists to inspect the Clarke Advice and disclosure note to ensure that any future reporting of the case is fully informed, subject to any such provision being subject to the sort of restrictions envisaged in Criminal Practice Direction 5B.15.

POL00158692

INTRODUCTION

5. By way of an application dated 26 November 2020, Nick Wallis has made an application under Criminal Procedure Rule 5.8 for the following:
   (i) A copy of the advice ("the Clarke Advice") appended to the Appellants' Note dated 16th November 2020 from Paul Marshall, Flora Page & Aria Grace Solicitors;
   (ii) An order that "all the appellants' solicitors who haven't yet done so, to release to the media any additional Grounds or supplementary material they have lodged with the court to support their clients' cases";
   (iii) An order that "all parties (who haven't done so already) to provide the media with a named contact representatives of the media can approach to request any documentation/evidence which is referred to during this and any subsequent Court of Appeal hearings pertaining to the Subpostmaster cases";
   (iv) To "give the media permission to buy or receive transcripts of the 18 and 19 November hearings, and transcripts of all subsequent hearings related to this case going forward";
   (v) To "allow the media to receive any written and/or orders/rulings made by the court once approved"

6. These submissions are intended to assist the Court in its consideration of the above applications by identifying the relevant legal and factual position, and to set out the Respondent's position in relation to the applications.

LEGAL PRINCIPLES

7. Applications by the media for information and documents relating to a case from a Court officer are governed by Criminal Procedure Rule 5.8 and Criminal Practice Direction 5B.

8. The proper approach to such applications is helpfully summarised in the "*Reporting Restrictions in the Criminal Courts*" guidance published by the Judicial College

POL00158692

dated June 2016[1]. In particular, part 5.2 (starting on page 32) deals with access to documents held on court files and part 5.3 (starting on page 33) deals with media access to "prosecution materials".

9. There is a clear presumption in favour of open justice, and a clear public interest in facilitating fair and accurate reporting of court proceedings. This does not, however, mean that there is a presumption in favour of releasing documents to the media that have not yet been read aloud in open court (or treated as such):

   9.1 Where a document has been read aloud in open court (or treated as such), then that document should generally be made available (see Criminal Practice Direction 5B.12 & 5B.13). The presumption is stronger in cases where the document has actually been read aloud than where it is only treated as such;

   9.2 Criminal Practice Direction 5B.14 & 5B.15 deal with documents which have been read aloud in part or summarised aloud:

   5B.14 Open justice requires only access to the part of the document that has been read aloud. If a member of the public requests a copy of such a document, the court should consider whether it is proportionate to order one of the parties to produce a suitably redacted version. If not, access to the document is unlikely to be granted; however open justice will generally have been satisfied by the document having been read out in court.

   5B.15 If the request comes from an accredited member of the press (see Access by reporters below), there may be circumstances in which the court orders that a copy of the whole document be shown to the reporter, or provided, subject to the condition that those matters that had not been read out to the court may not be used or reported. A breach of such an order would be treated as a contempt of court.

   9.3 Criminal Practice Direction 5B.19 deals with documents provided to the court but to which confidentiality attaches:

   5B.19 A document the content of which, though relied upon by the court, has not been communicated to the public or reporters, nor treated as if it had been, is likely to have been supplied in confidence and should be treated accordingly. This will apply even if the court has made reference to

[1] https://www.judiciary.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf

POL00158692

the document or quoted from the document. There is most unlikely to be a sufficient reason to displace the expectation of confidentiality ordinarily attaching to a document in this category, and it would be exceptional to permit the inspection or copying by a member of the public or of the media of such a document. The rights and legitimate interests of others are likely to outweigh the interests of open justice with respect these documents.

9.4 Criminal Practice Direction 5B.25 deals with the approach to Material disclosed under CPIA 1996 as follows:

To the extent that the content is deployed at trial, it becomes public at that hearing. Otherwise, it is a criminal offence for it to be disclosed: section 18 of the 1996 Act.

Although the post-conviction disclosure in this case is subject to the common law and not the CPIA 1996 disclosure regime, the Court will be mindful of the fact that post-conviction disclosure is subject to the common law rules of implied undertakings and the duty of confidence[2] thereby engaging Criminal Practice Direction 5B.19 above.

THE APPLICATION FOR THE CLARKE ADVICE

Background to, and significance of, the Clarke Advice

10. In an attempt to assist the Court and all Appellants, a disclosure note has been prepared to place the Clarke Advice in context and to dispel some of the misconceptions about the Advice and the manner of its disclosure that have been introduced by the written and oral submissions by those representing the Appellants Misra, Skinner and Felstead, and subsequently reported by the media (including Mr Wallis). A copy of this note is annexed to these submissions.

[2] The Supreme Court decision in *R (on the application of Nunn) v Chief Constable of Suffolk Constabulary and another (Respondents)* [2014] UKSC 37 confirmed that post-conviction disclosure was to be governed by the common law principles (per *ex parte Lee* (1999) EWHC Admin 242) and referring to the 2013 Attorney General's Guidelines on Disclosure, which provided at paragraph 70 that "*Disclosure of any material that is made outside the ambit of CPIA will attract confidentiality by virtue of Taylor v SFO* [1999] 2 AC 177." in which the court reaffirmed that the principles in *Harman v Secretary of State for the Home Department* [1983] AC 280 applied in criminal proceedings.

POL00158692

11. Contrary to what has been suggested, the matters raised in the Clarke Advice were not hidden by the Respondent. The position is addressed more fully within the disclosure note, but it should be noted that:
    11.1 The Respondent ceased to rely on Mr Jenkins as an expert witness;
    11.2 In 2013, the Respondent instructed Cartwright King solicitors to review the convictions of any individual who had been convicted in a case since 1 January 2010[3] in which Horizon evidence had been relied upon;
    11.3 That review exercise took place over a number of months and involved post-conviction disclosure of the known bugs being made (through disclosure of the Helen Rose report and the Second Sight Interim report) in any case where senior in-house counsel at Cartwright King considered that the disclosure test was met on the facts of the case;
    11.4 The Second Sight Interim Report, which contained the details of the two bugs, was released on 8 July 2013, and the Respondent posted a copy on its website.

Provision of the Clarke Advice to the CCRC

12. The Court has helpfully forwarded a copy of a letter dated 24 November 2020 from Sally Berlin of the CCRC who appears to have been provided with a copy of the Clarke Advice on Sunday 15 November 2020 by Mr Nick Gould, solicitor at Aria Grace with conduct of the appeals of Misra, Skinner and Felstead.

13. Within the letter, Ms Berlin indicates that the CCRC has not been served with a copy of the Clarke Advice, but "*cannot entirely rule out that the advice might have been contained within the many thousands of Post Office documents which have been made available to the CCRC throughout our review via an online 'data room'.*"

14. The Respondent does not believe that the Clarke Advice itself has been provided to the CCRC, although the Respondent has placed the CCRC on notice both of

[3] This date was used because the bugs known of at that stage were believed only to apply to Horizon Online rather than Legacy Horizon, and 1 January 2010 was the earliest date on which Horizon Online was migrated into all Post Office branches.

POL00158692

the existence and substantive content of the Clarke Advice since at least 27 February 2015:

14.1 The Respondent was in correspondence with the CCRC from 12 July 2013 in relation to the matters arising out of the Second Sight review;

14.2 To ensure that the post-conviction review being conducted by Cartwright King was appropriate, the Respondent instructed Brian Altman QC, among other things, to conduct a review of the process (although not the individual decisions in reviewed cases). The resultant document entitled 'General Review' by Brian Altman QC dated 15 October 2013 extensively referred, among other matters, to the Clarke Advice and its contents and conclusions;

14.3 The CCRC was aware of the existence both of the Cartwright King review and of Mr Altman QC's General Review;

14.4 In a letter addressed to Ms Berlin dated 5 June 2014, the conclusions of the General Review were summarised. The CCRC formally requested a copy of the General Review by way of a s.17 notice dated 14 January 2015 and the Respondent provided it to them on 27 February 2015;

14.5 It follows that the CCRC were on notice not only of the existence of the Clarke Advice by 27 February 2015, but also of its content and conclusions;

14.6 There has been full cooperation between the Respondent and the CCRC in relation to the provision of material sought. An iterative process was adopted between the Respondent and the CCRC whereby the material requested by the CCRC by way of s.17 notice was informed by discussions with the Respondent about the material it holds[4]. The Respondent has complied with all s.17 requests made of it.

15. The Respondent further observes that all GDR disclosure in the case is provided to the CCRC (by way of s.17 notice) as a matter of course. As such, because the Clarke Advice forms part of Tranche 3 GDR disclosure, it would have been provided to the CCRC on or around 4 December 2020 in any event.

Respondent's stance in relation to the application

[4] The Court will appreciate the importance of ensuring that all material is provided pursuant to a s.17 notice as it is the statutory mechanism intended by Parliament to enable a party providing material to preserve LPP over documents provided to the CCRC (per s.25).

POL00158692

16. As Mr Wallis' application accurately states, the Respondent's position as conveyed to Mr Wallis is that:

> "*POL wants to be open and accountable and share information with the media as far as it is able to do so, but the Court of Appeal has made it very clear that it wishes to regulate any further public disclosure of the Clarke advice. Therefore, your application to see the document will need to be decided by the Court.*"

17. Whilst the Respondent is committed to ensuring open and fair reporting of matters properly ventilated in open court, the Court may wish to take the following factors into consideration in considering Mr Wallis' application:

    17.1 At present, the Clarke Advice has not been read in open court;

    17.2 Although not CPIA disclosure, the principles derived from Criminal Practice Direction 5B.25 are clear that disclosed material ought not to be released unless and until it is placed into the public domain in open court. Moreover, the common law principles governing post-conviction disclosure[5] are such that it is protected by confidentiality and therefore Criminal Practice Direction 5B.19 applies;

    17.3 Although disclosed in accordance with the Respondent's disclosure obligations in *Nunn*, it should be kept in mind that the Clarke Advice is and remains a document to which privilege attaches. Any waiver is expressly limited to its use within the appeal proceedings;

    17.4 At the hearing on 18 November 2020, Mr Altman QC mentioned the Clarke Advice in the context of drawing the Court's attention to the e-mail from Miss Page to Lewis Page. In doing so, there was reference to the nature of the content of the document, but the contents were neither read in open Court nor substantively summarised within the meaning of Criminal Practice Direction 5B.14;

    17.5 Later in the hearing on 18 November, during consideration of a separate hearing to deal with the discrete point of law relating to whether the Court was bound to consider argument on ground two of the CCRC's Statement of

[5] See footnote 2 above

POL00158692

Reasons, Mr Marshall started to read, or at least summarise, parts of the Clarke Advice, but the Court stopped him and made clear that the Advice was irrelevant to the matters under discussion at the hearing. As such, the Clarke Advice was not read or summarised by Mr Marshall within the meaning of Criminal Practice Direction 5B.14;

17.6 Likewise, the written submissions to which the Clarke Advice was attached did not relate to matters that were dealt with in argument at the hearing on 18 November;

17.7 Subject to the Court's view on whether the Court is obliged to consider ground 2 of the Statement of Reasons[6] (and/or give leave to Mr Marshall to advance new second limb abuse submissions), it may be that the Clarke Advice will never be a document referred to during legal argument, as it would be unlikely to be relevant to any submissions advanced under the CCRC's first ground;

17.8 In any event, the Court is aware of the ongoing investigation into Mr Jenkins and another, and has already indicated that it is mindful that consideration might have to be given to reporting restrictions in light of the state of the investigation at the time that the Clarke Advice becomes relevant (if it ever does).

18. Notwithstanding the above, the Respondent is keen to assist the Media to ensure fair and accurate reporting, which includes assisting the press covering cases to be properly informed about the issues in their proper context. The Court may wish to consider allowing Mr Wallis and other interested journalists to inspect the Clarke Advice and disclosure note to ensure that any future reporting of the case is fully informed, subject to any such provision being subject to the sort of restrictions envisaged within the terms and conditions of Criminal Practice Direction 5B.15.

THE APPLICATION FOR ADDITIONAL GROUNDS & SUBMISSIONS

19. The Respondent has already assisted Mr Wallis by providing a copy of the Respondent's Notices.

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[6] A matter to be resolved at the hearing on 17 December 2020

POL00158692

20. It is respectfully submitted that Mr Wallis' application for an order directing individual appellants to provide documents is misplaced. Criminal Procedure Rule 5.8 expressly governs applications for provision of information and documents by court officers, not by the parties.

21. It is submitted that it is preferable that the Court should be the gatekeeper for such requests in accordance with the Criminal Procedure Rule scheme to ensure that any provision of material is consistent with the Court's duty to consider such applications with all relevant considerations in mind.

OTHER APPLICATIONS

22. In respect of the request for an order that the Court direct that the parties must provide a named contact for media enquiries, the Respondent has no objection to providing such a point of conduct (and has done so), but queries whether the Court could or should require individual firms of solicitors to have such a point of contact. As noted above, Criminal Procedure Rule 5.8 expressly governs applications for provision of information and documents by court officers, not by the parties.

23. The list of representation is a matter of public record, and there could be no objection to this being provided to Mr Wallis (and any other interested journalist or media organisation). It would then be a matter for the media to contact each firm to ascertain whether they are willing to co-operate.

24. Subject to the Court's absolute right to restrict reporting of proceedings, the Respondent has no objection to the applications at paragraph 5(iv) and (v) above.

25. In relation to the application for transcripts and written rulings, the Court will wish to have regard to Criminal Practice Direction 5B.29 to 33.

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POL00158692

JACQUELINE CAREY

30 November 2020